No. 3199

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SHIPOWNERS AND MERCHANTS TUGBOAT COMPANY (a corporation), claimant of the American Steam Tug "Fearless", her boilers, engines, tackle, apparel and furniture,

Appellant,

vs.

A. H. BULL & COMPANY, INC. (a corporation),

Appellee.

APPELLANT'S REPLY TO APPELLEE'S SECOND GROUP OF "OUT OF THE RECORD" STATEMENTS.

WILLIAM DENMAN,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Appellant.

Index

No. 3199

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SHIPOWNERS AND MERCHANTS TUGBOAT COMPANY (a corporation), claimant of the American Steam Tug "Fearless", her boilers, engines, tackle, apparel and furniture,

Appellant,

vs.

A. H. BULL & COMPANY, INC. (a corporation),

Appellee.

APPELLANT'S REPLY TO APPELLEE'S SECOND GROUP OF "OUT OF THE RECORD" STATEMENTS.

I.

Appellee's Erroneous "Out of the Record" Statement That Appellant Has Shifted Its Ground on Appeal.

It is with great discomfort that we are again called upon by the reply brief of the appellee to consider and refute new and further "out of the record" statements of too serious import to the interest of our client to warrant our ignoring them. This last brief of the appellee suggests a shifting of the tug's theory of the case on the appeal, when a new proctor for the tug was added.

The court will recall that, in our briefs heretofore filed, it has been our contention that the proximate cause of the damage to the "Edith" was (1) either the failure to drop her anchors or to try out her engines when her captain knew, off pier 42, that a piece of tow line had caught in her propeller; or (2) the failure to tell the captain of the tug of this mishap and transfer the command of the maneuver to him, with full knowledge, so that *he* could have the choice of ordering the dropping of the anchors, or the trying out of the propeller, or of towing from the stern directly away from the docks, instead of attempting to tow from the port bow of the "Edith", under the erroneous belief that he was to receive the assistance of her reversing engines. We contended that this was the proximate cause of the loss, because, despite previous mishaps, there was abundant time and distance between pier 42 and pier 32 to have brought her to a place of safety. This was made clear beyond the question of a doubt by the showing that her reversing in the last two hundred feet of the sixteen hundred feet between pier 42 and pier 32 brought the "Edith" within one hundred and ten feet of safety; that is, within one hundred and ten feet of clearing pier 32, and backing far out into the bay to a point of complete safety.

Our contention here involved the fault of the "Edith" and her captain as the proximate cause of the injury and as rendering the tug entirely free from liability.

The appellee, in its last brief, makes, at page 9, the following statement to the effect that this was not the position taken by the tug in the lower court:

> "The gist of appellant's reply is based on the suggestion of non-production of testimony, the possible relevancy of which to the issues in this case is not apparent. The tug is the vessel whose conduct is under investigation. It is useless to attempt to shift the issue. If the tug was not justified in her conduct, the decree should be affirmed. Whether or not she was justified was at least the principal issue under investigation by the trial court, and on which the determination of this controversy rested. *No conduct on the part of the 'Edith' could have rendered her solely liable, for at best any maneuver which she might have undertaken would have been defensive and to save herself in extremis from the actions of the tug. The case was so viewed and tried by the court and by all counsel until the advent of Mr. Denman in the case.*"

This statement involves the consideration of the brief of the proctors for the tug in the District Court, for in that brief necessarily are embodied the tug's views of the issue under which the case was there tried. This brief is not a part of the Apostles. The appellee does not offer it now, but asks the court to proceed on its statement of this "out of the record" evidence.

Mr. Denman's advent in the case came in the summer of 1918, when he was associated with Mr. Farnham P. Griffiths of the firm of McCutchen, Olney & Willard in the preparation of the briefs in this court.

The arguments in the tug's brief in the District Court on the question of proximate causation are sum-

marized in the following captions of different chapters of the brief:

> "The Contract was for an 'Assist', Not a Towage. The tug was an attendant on the steamer, not chargeable with responsibility of a tug in control of the operation, for the steamer was under her own power and in command of her master."
>
> (Tug's brief District Court, page 2.)

> "The collision was *solely* caused by the negligent handling of the 'Edith'."
>
> (Tug's brief District Court, page 15.)

> "The getting of the line in the wheel was *solely* the 'Edith's' fault in working her engines while hauling in the line."
>
> (Tug's brief District Court, page 26.)

> "The letting go of the line by the 'Fearless' was not negligence, and she did not thereby become responsible for the failure of the 'Edith' to avoid collision with pier 32."
>
> (Tug's brief District Court, page 37.)

> "The 'Edith' failed in her duty to furnish a good line to the 'Fearless'."
>
> (Tug's brief District Court, page 41.)

> "The failure of the 'Edith' to anchor caused the collision."
>
> (Tug's brief District Court, page 49.)

> "The failure of the master to go astern on the 'Edith's' engines caused the collision."
>
> (Tug's brief District Court, page 52.)

It is submitted that Mr. Denman's advent in the case has not in the slightest way changed the tug's attitude towards the collision, which has been from the beginning that the "Edith" was solely at fault. We are not

aware of a word of the tug's proctors in the record in the lower court which indicated, in the slightest way, that the tug, at any time, had any other position, than that the "Edith's" negligence was the *sole* proximate cause of the collision.

We submit that the charge of shifting the theory of the case on the addition of a new proctor on appeal is not borne out by a consideration of the "out of the record" evidence on which the charge necessarily rests.

II.

Appellee's Erroneous "Out of the Record" Statements Concerning a Failure to Call the Lower Court's Attention to Absence of Testimony.

We regret to note a further "out of the record" statement of the appellee which is not borne out by the facts. The appellee's reply brief says, at page 9:

> "The gist of appellant's reply is based on the suggestion of non-production of *testimony,* the possible relevancy of which to the issues in this case is not apparent. * * * We submit that it is too late now to urge this court to reverse a decree because the *testimony* was not adduced which counsel on neither side asked for and which counsel on neither side apparently wanted, *and the absence of which was not even called to the attention of* or noted by the trial court."

In our briefs in this court, we have called to the attention of the court the absence of the testimony of the various witnesses on the "Edith", which would

have had a vital bearing on the case. We have pointed out that even if we had not demanded the logs, the testimony of these witnesses, or, at any rate a portion of them, would, undoubtedly, have been refreshed from the logs, or would have caused, on cross-examination, the production of the logs.

We have summarized our contention in this court on this question in the following headings of our reply brief:

> "I. The 'Edith's' captain let her drift from off pier 42 almost to pier 32 in plain view of her danger without dropping his anchors or attempting to use his engines—*and herein of the relevancy of the non-production of witnesses* and logs."
>
> "IV. The line of the tug was unloosened when the 'Edith's' engines were stopped—and herein of *the further relevancy of the testimony of the missing first mate and engineer* and of their logs."
>
> "VI. Appellee has not explained the failure to produce the first mate, his bridge log, the official log, the man at the wheel, the engineer, the assistant engineer, the engine room log and scratch logs, and any of her seven or eight sailors handling the tow lines, all of whom were eyewitnesses to disputed facts."

The testimony in the case shows that the first mate and the engineer were primarily responsible for the keeping of the bridge and engine room logs.

At page 52 of the tug's brief *in the lower court*, the failure to produce the testimony of these two officers

and other officers and members of the crew is called to the attention of the District Court in the following language:

> "What did the master do to prevent the collision? Not a single solitary thing. It did occur to him that he ought to do something (Dep. 36), but he didn't do it until too late. He could readily see that they were in a position of danger from drifting down, and knew that they surely must bring up against something (Dep. 42). After the line was in the wheel, did he have any communication with the engine room? No. Did he send any word to the engineers about it? *No* (Dep. 42). Yet he drifted from off pier 42 to between piers 34 and 32 (Dep. 42-3). He really thought he did go aft, but could not remember even that—'I swear I think I did—no, I could not say that I did (Dep. 35). Apparently, he remained on the bridge, did not examine the line, did not have any communication whatever with the engineers—in fact, did nothing! Splendid seamanship, wasn't it? *Is it any wonder that the first mate, or the chief engineer, or any of the other officers or members of the crew were not called as witnesses to inform us as to what was done aboard ship?*"

Since appellee has invoked this "out of the record" method in the trial of the case, we will have to beg the court to assume that, unless appellee contradicts our assertion as to the contents of the brief in the lower court, our excerpts from it are to be deemed correct.

We submit that counsel's remarks about the failure to call the absence of testimony to the attention of the District Court are not borne out by the brief of the tug in that court.

III.

Inaccuracies in Appellee's Reply Brief on the Question of the Time it Took the "Edith" to Drift From Pier 42 to Pier 32 in Its Attempt to Excuse the Non-Production of the Testimony of the Engineer or the Evidence of His Log.

One of the vital questions in this case has been the time occupied by the "Edith" in drifting from pier 42, where the captain discovered that the line was in his propeller, to pier 32 on which the "Edith", who had been backing at the last instant, was impaled somewhere around one-third of the distance from her bow.

Concerning this, appellee's reply brief at p. 5 says:

> "Nor was the element of time between the dropping of the line and the collision in serious dispute. The tug's witnesses swore that it was five to seven minutes (Apos. pp. 330, 176, 337.)"

The Apostles at the pages indicated say nothing of the kind. At page 176 nothing is said about the length of time the "Edith" drifted, nor is there anything from which that time could be inferred. The only testimony on that page is that of the tug's deckhand as to the length of time it would have taken the "Edith" to haul in a tow line.

At page 330 the tug's captain says:

> "A. *As soon as I got under the bow I laid there all the time while he was drifting.*
>
> Q. You *drifted together* from that position to where you say you got the line?
>
> A. To where I got the line.
>
> Q. How long did it take you to go that distance?

A. It was a long time, I imagined—possibly 8 minutes—6 or 7 minutes, somewhere around there."

The most that can be said for this testimony is that it took somewhere between 6 and 8 minutes, after the tug had dropped its line from the stern of the "Edith" and had gone to her bow, where she lay all the time they were drifting together, to drift to the point where the tug took the "Edith's" third tow line. The period of time *before* this, i. e., from the dropping of the line to the arrival of the tug, which had to turn clean around, at the bow of the vessel, is not included. The period of time *after* the tug took the third line, which included the movement of the tug from the port bow of the "Edith" to the end of the line, the starting of the tug's engines in towing, and up to the time of the breaking of the line and thereafter, the period during which the "Edith" backed herself from dead in the water to over 200 feet astern, is also not included.

More than this, the tug's captain testified, in supplement to his estimate of six to eight minutes of the drift together, that it took three or four minutes for him to move from the point where he dropped his line *to admidships* on the "Edith's" starboard side. This testimony is as follows:

"Q. How long did it take you, captain, to go around after the line had been cast off, to this position amidships of the 'Edith'?

A. Possibly four minutes.

Q. Four minutes? A. Three or four minutes.

Q. Three to four minutes? A. Yes.

Q. It took you three or four minutes to come from the stern of the 'Edith' around on the starboard side until you were about amidships?

A. About that.
Q. Three or four minutes? A. Yes.
Q. In those three or four minutes she drifted from the position opposite pier 44 to a position amidships between 44 and 42? A. Yes."

(Apos. pp. 337-8.)

How long it took for the "Edith" to drift from the point where the tow boat took the third line, to the collision—covering the transactions in running to the end of the line, applying power, breaking the lines and backing the "Edith" over 200 feet from a standstill —is not estimated; but it is fair to presume that it took not less than four minutes.

This would make it a fair inference from the captain's testimony, that not less than *fifteen* minutes were consumed in drifting from off pier 42, where the "Edith's" captain learned that the line was in his propeller, to the point of collision.

Appellee, in his last brief, clearly disputes this, and says that it was between 5 and 7 minutes.

We ask again, how can the appellee, in view of this conflict, excuse the non-production of its engineer? In the ordinary course of his duties, he would enter in his engineer's log (1) the time off pier 42, when the captain, believing the line in the wheel, ordered him to stop his engines; and (2) the time he started his engines again to go astern just before she struck pier 32, and (3) the time when the "Edith" crashed into the pier. The engineer in making these entries glances at the clock and puts the time down to the very minute. The testimony shows that the

entries presumably were made (Apos. p. 48.) Did the appellee fear that if the engineer were produced his cross-examination, based upon his log, would show that the tug's captain's estimate was correct; namely, that there was a period of nearly 15 minutes during which the "Edith" could have dropped her anchors, or at least have made the attempt to find out whether the imagined disablement of her propeller, in fact, existed?

Conclusion.

In conclusion, we desire to beg counsel and the court to believe us when we say that it will take a third wandering from the record to convince us that any of these errors of statement were intentional. We regret that they were not of such slight bearing on the issues that, without damaging our client's interest, we could have ignored them.

Dated, San Francisco,
December 21, 1918.

Respectfully submitted,

William Denman,
McCutchen, Olney & Willard,
Proctors for Appellant.